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DEC

Supreme Court of the United States

OCTOBER TERM, 1931

No. 170

GREGG DYEING COMPANY, Appellant,

against

W. G. QUERY, J. P. DERHAM, and FRANK C. ROBINSON, Personally and as Members of the South Carolina Tax Commission, Appellees.

No. 245

THE CITY OF GREENVILLE ET AL., Appellants,

against

W. G. QUERY, J. P. DERHAM, and F. C. ROBINSON, Personally and as Members of the South Carolina Tax Commission, Appellees.

APPELLEES' ARGUMENT

JOHN M. DANIEL,
Attorney General for South Carolina.

J. FRASER LYON,
Solicitor for Appellees.

THE R. L. BRYAN CO., COLUMBIA, S. C.
11-30-31-30

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At present and for several years past persons and corporations dealing in gasoline intrastate in South Carolina have, under the several Acts of the General Assembly, been required to pay a tax for the privilege of engaging in such business. The amount of the tax is determined by applying the rate per gallon to the number of gallons sold, plus the number of gallons used by the dealer, or seller. The result of this tax upon the seller is necessarily the enhancement of the price thereof to the consumer by the amount of the tax, and this applies to the seller when he uses his own gasoline and to the consumer indirectly on that which he buys.

It was found that many large users of gasoline in South Carolina in order to avoid the enhancement of the price of gasoline when bought from a South Carolina refiner or other dealer, bought gasoline outside of the State and brought it into the State and stored it for future use. It was only in this way that one could obtain and consume gasoline in South Carolina without bearing the indirect tax burden.

In 1930 the General Assembly passed the Act complained of in this case, whereby it imposed a tax on gasoline brought into this State, not for the purpose of sale, but for storage for future use in the State. The Act especially provides that if a tax has been paid by a dealer under the Act of 1925 and Act of 1929, then no further tax will be required for storage thereof for future use.

The tax under the Act of 1929 is at the rate of 6c per gallon upon all gasoline sold and upon all used by the seller. The tax under the 1930 Act is at the rate of 6c per gallon upon all purchased outside of the State and stored for future use within the State. Such thereof as is not stored for future use in South Carolina is not taxed.

It is true that Standard Oil Company refines and stores gasoline in Charleston, South Carolina, and it pays no tax on account of the storage thereof. However, it pays the tax on all sold within the State, except as hereinbelow explained, and

upon all used in the State; that kept in storage for sale and shipment outside of the State is not taxed.

When Standard Oil Company, or other dealers in gasoline in South Carolina, sell a tank car of gasoline to another South Carolina dealer, the Oil Company, or first seller, is not required to pay the tax on that, but the South Carolina dealer who buys it and who resells it is required to pay the tax when and as the gasoline is used and sold by such dealer. Were it not for this arrangement, no dealer in South Carolina would buy from another dealer or refiner in South Carolina as the tax would otherwise be required to be paid in advance on the first sale, and the second seller would not have the advantage of paying the tax after the gasoline is sold or used by him.

The result necessarily would be that independent dealers buying in tank car lots would not buy from Standard Oil Company in South Carolina, nor from any other oil company having storage and distributing capacity in the State, but would buy outside of the State and secure the advantage of paying the tax after the sale or use of the gasoline.

If the Act complained of (1930) is sustained, all gasoline consumed in South Carolina will either directly or indirectly bear a tax of 6c per gallon, and such gasoline manufactured within the State and such as is brought in from without the State, will bear the same tax and be on an exact parity.

If the Act of 1930 is declared void, the result will be that many large users of gasoline in the State will not patronize the Standard Oil Refinery in Charleston, nor any other oil company having large or small distributing plants in the State, but will, as plaintiffs do, buy outside the State and store within the State for future use and avoid payment of the tax indirectly as to it.

If the Act complained of should have been written so as to provide that all persons and corporations storing gasoline for future use within the State, which gasoline had not theretofore borne the 6c per gallon tax, should for the privilege of storing for future use and consumption such gasoline, pay an excise of 6c per gallon, such would mean no more and no less

than the Act of 1930 as it is actually written; for that oil companies and dealers whether the gasoline they deal in is refined in South Carolina, or brought into the State from another state, pay the tax of 6c per gallon on all they sell and upon all they use within the State, and that stored for future use would bear the 6c per gallon tax, provided a tax of 6c per gallon had not been paid by a seller before the storage for future use.

Plaintiffs cannot buy gasoline within the State without bearing indirectly the tax of 6c per gallon, and when the Act of 1930 specifically imposes a tax on gasoline brought in from another state, it does so because such gasoline so brought into the State did not under the Acts of 1925 and 1929 bear the 6c per gallon tax and was not on a parity, so far as the tax was concerned, with all other gasoline sold and used within the State. In other words, the Legislature found the only way one had of ultimately avoiding the burden of tax under the Acts of 1925 and 1929 was to buy gasoline in another state, bring it into South Carolina and store it for future use, and it directed the complementary legislation to the exact gasoline which was being used and consumed in the State and which bore no tax burden.

It is true that Standard Oil Company in Charleston, and all other companies, may store gasoline without paying a tax on the storage for future use, and they all may sell and deliver gasoline to out of the State consumers without paying the tax thereon, but they are required to and do pay the tax on all they sell and all they use in the State. Plaintiffs, under the Act of 1930, are required to pay the tax on all it stores for future use within the State, but, like Standard Oil Company and others, they may store any quantity in the State without being required to pay the tax, provided it is intended to be ultimately used without the State. They have, so far as the tax is concerned, every right and privilege enjoyed by Standard Oil Refinery, as well as all others storing gasoline within the State, which may be brought from without the State. The

tax on the storage for future use in South Carolina is the same as the tax on sales and use in South Carolina.

The relevant sections of the Act of 1930 are as follows:

"Section 1. *Be it enacted* by the General Assembly of the State of South Carolina: Every person, firm, corporation, municipality, County, or any subdivision thereof, in the State of South Carolina which shall import into this State from any other State or foreign Country, or shall receive by any means into this State, and keep in storage in this State for a period of twenty-four hours or more, after the same shall have lost its interstate character as a shipment in interstate commerce, any gasoline or any other like products of petroleum or under whatever name designated, which is intended to be stored or used for consumption in this State, shall pay a license tax of six cents per gallon for every gallon of gasoline, or other like products of petroleum aforementioned, which shall have been shipped or imported into this State from any other State or foreign country, and which shall hereafter, for a period of twenty-four hours after it loses its interstate character as a shipment of interstate commerce be kept in storage in this State to be used and consumed in this State by any person, firm, or corporation, municipality, county or subdivision thereof, and which has not already been subjected to the payment of the license taxes imposed upon the sale thereof by Acts of the General Assembly of the State of South Carolina, the same being Act, No. 34, Acts of 1925, approved the 23rd day of March, 1925, and Act No. 102, Acts of 1929, approved the 16th day of March, 1929, imposing license taxes for the privilege of dealing in gasoline or other like products of petroleum; *Provided*, That this Act shall not impose a tax upon crude petroleum, residium or smudge oil, *Provided, further*, That one percent to cover the loss by evaporation, spillage or otherwise shall be deducted by the taxpayer when remitting the tax required by this Act."

"Section 6. Nothing within this Act shall be con-

strued to impose a license tax upon any selling agent, consumer, or retailer, selling, consigning, shipping, distributing or using gasoline, combinations thereof, or substitutes therefor, which may have been bought from any oil company on which the license taxes imposed by Act. No. 34, Acts of the General Assembly of 1925, approved the 23rd of March, 1925, and Act No. 102, Acts of the General Assembly of 1929, approved the 16th day of March, 1929, have been paid nor shall this Act be construed as applying in the case of interstate commerce."

That the Legislature had a purpose to round out and complete legislation to tax all gasoline consumed in the State is evidenced by the fact that the above-quoted sections of the Act of 1930 provide that if the tax has been paid under the Acts of 1925 and 1929, no further tax shall be required under the Act of 1930.

When the question as in this case is whether the state taxing law contravenes rights secured under the Federal Constitution, the decision does not depend upon mere question of form, construction or definition, but upon the practical operation and effect of the tax imposed.

Regardless of the phraseology contained in the Act of 1930, its practical operation and effect is to put gasoline brought in from another state and stored for future use within this State on an exact parity and equality with all other gasoline used within the State and sold within the State.

If there be any discrimination, it is in favor of the gasoline described in the Act of 1930, for as much of that gasoline as may be used after it is delivered to the consignee and within twenty-four hours thereafter may not be taxed at all. Gasoline sold within the State and that used by the seller enjoys no such privilege. When gasoline is received from another state by a dealer in South Carolina and the dealer immediately sells or uses the same within the State, the tax must be paid. When Standard Oil Company refines gasoline in Charleston and immediately sells the same or uses the same within the State, the tax must be paid.

Neither of the above are allowed to use or sell gasoline for a period of twenty-four hours after it has lost ' s immunity as interstate commerce without paying the tax.

> "This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the federal Constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed."
>
> *Shaffer v. Carter,* 252 U. S., 37, 40 Sup. Ct. Rep., 221–226.

> "And further, in determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, our decision must regard the substance of the exaction,—its operation and effect as enforced,—and cannot depend upon the manner in which the taxing scheme has been characterized."
>
> *Kansas City F. S. & M. Ry. Co. v. Botkin,* 240 U. S., 227, 36 Sup. Ct. Rep., 261.

The construction of a state statute by the State Supreme Court will be accepted by the Supreme Court of the United States, and such construction treated as a part of the statute itself.

The Supreme Court of South Carolina has construed the Act of 1930, together with the Acts of 1925 and 1929, has ruled that they must all be read together as one Act and that under these several statutes the gasoline defined in the Act of 1930 bears no greater tax burden than other gasoline used and consumed in the State.

Referring to the Act of 1930, the State Court held:

> (T-30) "The Act of 1930 puts gasoline imported in interstate commerce and thereafter stored to be used and consumed in South Carolina on the same basis, as to

taxation, as domestic gasoline, that is, gasoline produced in this state and used and consumed in this state.

. . . . . .

"The tax applies only to persons who store with intent to use and consume the gasoline in South Carolina. The class sought to be reached by the tax is clear. The tax is single upon the use and consumption in South Carolina of gasoline, whether imported or not. Mere storage after manufacture or production is not enough to provoke the application of the tax. The only kind of storage affected is that with intent to use and consume the product in South Carolina. Such intention on its part petitioner admits to exist in the instant case, and in all future transactions. The fact that the Standard Oil Company at Charleston, S. C., manufactures and produces large quantities of gasoline which is stored at its refinery and which is untaxed before its sale or use in South Carolina, does not, to our mind, work a discrimination against petitioner or producers in other states. It is admitted that that Company, like all others, is required to pay and does pay a tax of six cents on all of its product sold in South Carolina or used and consumed in its business. The equality and uniformity of the tax is apparent.

"That a tax-free period of twenty-four hours on all gasoline brought into the State by petitioner and others in like plight is allowed by the Act, cannot, we think, be a ground of complaint on the part of petitioner.

"Taking then, these Gasolin Tax Acts as a whole and construing them as one enactment as we must in order to ascertain the intention of the Legislature and to give full force and effect to the expressed public policy of the State to lay a gallonage tax on all gasoline sold, used and consumed in South Carolina, regardless of origin, it is our opinion that these objections to the Act of 1930 under the Federal Constitution cannot be sustained."

And so the State Supreme Court has contrued the Statutes of South Carolina as placing upon appellant's gasoline no

greater tax than is placed upon other gasoline similarly circumstanced in South Carolina.

> "The construction given a state statute by the highest judicial tribunal of the state is regarded as a part of the statute and is as binding upon the Courts of the United State as the text."
>
> *Zeiger v. Penn. R. Co.*, 151 Fed., 348.
> Judgment in the above affirmed: 158 Fed., 809.
> Certiorari denied: 212 U. S., 575, 29 Sup. Ct. Rep., 684.
> *Jos. Dixon Crucible Co. v. Paul*, 167 Fed., 784.
> *City of Winchester et al. v. Winchester Waterworks Co.*, 251 U. S., 192, 40 Sup. Ct. Rep., 123.
> *Palmer v. Ohio*, 248 U. S., 32, 39 Sup. Ct. Rep., 16.
> *Latourette v. McMaster*, 248 U. S., 465, 39 Sup. Ct. Rep., 160.
> *People v. McCall*, 245 U. S., 345, 38 Sup. Ct. Rep., 123.

The Acts of 1925, 1929 and 1930 should be construed pari materia:

This is especially true because the Act of 1930, aside from legislating on the same subject, specifically refers to the Acts of 1925 and 1929, and by its terms these other Acts must be taken into consideration for the purpose of construction and enforcement of the Act of 1930.

In addition to the authorities cited by the Supreme Court of South Carolina on the above subject, we cite the following:

> *U. S. v. Saunders*, 22 Wall., 492.
> *U. S. v. Farden*, 99 U. S., 10.
> *Veterbo v. Friedlander*, 120 U. S., 707.
> *U. S. v. Freeman*, 3 How., 556.
> *U. S. v. Babbit*, 1 Black, 55.
> *St. Louis I. M. & S. R. Co. v. U. S.*, 251 U. S., 198.

Assignment of Errors Nos. 4 and 5 are to the effect that the South Carolina Court erred in not holding this to be a license tax and that a license tax cannot be laid in part upon interstate commerce.

We deem it sufficient answer to the above to call the Court's attention to that part of the Act of 1930 which, as to the gasoline referred to, provides:

> ". . . shall pay a license tax of six cents per gallon for every gallon of gasoline, etc., aforementioned, which shall have been shipped or imported into this State from any other state or foreign country, and which shall hereafter, for a period of twenty-four hours after it loses its interstate character as a shipment of interstate commerce, be kept in storage in this State to be used and consumed in this State."

The South Carolina Court held:

> "On its face, the Act expressly negatives an intention to tax interstate commerce. It does not purpose to tax any gasoline until twenty-four hours after it has lost its interstate character. It seeks to operate only after the commodity has been severed from its interstate character and has become at rest as a part of the general mass of property in this State subject to the protection of its laws. Its immunity from State taxation is then at an end."

Assignment of Error No. 6 is to the effect that the Act violates the Commerce Clause and equal protection Clause of the Fourteenth Amendment to the Federal Constitution, in that it discriminates against gasoline produced by other states; places the tax only upon those who import gasoline in interstate commerce and store it for twenty-four hours for future use; that it appears that gasoline is manufactured within the State, and that such gasoline stored for future use and consumption in the State is exempt from the tax imposed under the Act of 1930.

It is true that gasoline manufactured within South Carolina and stored for future use and consumption is exempt from the tax, but all such gasoline, whether stored for future use or

not, is subject to a tax of six cents per gallon when it is used in the State and when it is sold in the State. See Stipulation T-50.

The South Carolina Supreme Court held:

> "The fact that the Standard Oil Company at Charleston, S. C., manufactures and produces large quantities of gasoline which is stored at its refinery and which is untaxed before its sale or use in South Carolina, does not, to our mind, work a discrimination against petitioner or producers in other states. It is admitted that that Company, like all others, is required to pay and does pay a tax of six cents on all of its product sold in South Carolina or used and consumed in its business. The equality and uniformity of the tax is apparent."

As to the interstate character:

We have already presented our views on the question as to the tax being a burden on interstate commerce and will not repeat here what we have heretofore said upon that subject.

As to assignment of Error No. 10:

It is claimed under this assignment that the South Carolina Court erred in construing the Act of 1925 and the Act of 1929 as placing a tax upon gasoline merely used within the State of South Carolina and that Standard Oil Company is legally forced and required to pay the tax upon gasoline used by it in its fleet of trucks in the State, and that the tax of six cents per gallon is by statute passed on to all users of gasoline.

As hereinbefore pointed out, we think this Court is bound by the construction of the Statutes of South Carolina made by the Supreme Court of that State. Besides, it is stipulated that gasoline sold and used by the seller in this State is taxed (T-50), and as held by the State Court the effect of a tax such as this, indirect, is that the ultimate consumer pays it.

As to assignment of Error No. 11:

Assignment of Error No. 11 is to the effect that the Court erred in holding that the Acts of the State, taken as a whole, reach and tax all gasoline consumed in the State, while the

Act of 1930 expressly leaves free of taxation gasoline used within twenty-four hours after its importation, and that the Acts of 1925 and 1929 do not legally impose a tax on gasoline produced and used, but not sold in South Carolina.

In answer to the above, the South Carolina Court held:

> "It is admitted that that Company, like all others, is required to pay, and does pay, a tax of six cents on all of its product sold in South Carolina or used and consumed in its business."

See also stipulation of Counsel, page 50.

And so it is construed by the State Court of last resort that if there is any discrimination, it is in favor of plaintff and all of those similarly situated, for they may purchase gasoline in another state, bring it into this State, store and use any part of it within twenty-four hours and not be required to pay a tax, as the Court held:

> "that a tax free period of twenty-four hours on all gasoline brought into the State by petitioner and others in like plight as allowed by the Act, cannot, we think, be a ground of complaint on the part of petitioner" (T-31).

As to assignment of Errors Nos. 12 and 13:

Assignment of Errors Nos. 12 and 13 are to the effect that the Act in question violates certain provisions of the State Constitution.

The Court of last resort of the State having passed upon these matters, we do not think they are open for question here.

We think that the tax in question in this litigation is according to the decisions of this Court and of the South Carolina Court, purely an excise, and that the State has power to impose it:

Texas v. Brown, 258 U. S., 466-481, 42 Sup. Ct. Rep., 375; 66 Law Ed., 721-728.

Bromley v. McCaughn, 280 U. S., 124, 50 Sup. Ct. Rep., 46; 74 Law Ed., 226.

Hart Refineries v. Harmon, 278 U. S., 499, 49 Sup. Ct. Rep., 188.

It appears under the facts in this case that the tax is not upon interstate commerce, as the Act specifically provides that the tax shall only attach twenty-four hours after the gasoline has lost its character of interstate commerce. The complaint alleges, Paragraph 6, that the gasoline was unloaded by the plaintiff and stored in its tanks at its plant in Aiken County, South Carolina, for a period of more than twenty-four hours, and it is stipulated (T-16), that gasoline is unloaded by plaintiff at Graniteville, S. C., and was there stored for more than twenty-four hours.

The tax does not discriminate against products of a sister state, because the tax required to be paid by plaintiff for the storage, consumption and use of the gasoline described in the complaint at the rate of six cents per gallon is the same amount of tax required to be paid upon all gasoline sold, and upon all gasoline used by the seller in South Carolina and the tax paid upon the use by the seller is direct, and that paid by other consumers is indirect.

All of which is respectfully submitted for the consideration of this Honorable Court.

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J. FRASER LYON,
Solicitors for Appellees.